

IN THE MISSOURI SUPREME COURT

In Re the Estate of,)
RAYMOND KLAUBER,) Cause No SC83350
)
)
)

RESPONDENT’S SUBSTITUTE BRIEF AND ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
JURISDICTIONAL STATEMENT	5
STATEMENT OF FACTS	6
POINTS RELIED ON	7
ARGUMENT	9
CONCLUSION	24
CERTIFICATE OF SERVICE	25
CERTIFICATE OF COMPLIANCE WITH SPECIAL RULE #1	26

TABLE OF AUTHORITIES

Becker Glove International, Inc., v. Jack Dubinsky & Sons, et. al.,

Case Number SC83294 (Mo. April 2001).....10, 11

Exchange National Bank v. Wolken, 819 SW2d 45 (Mo. Banc 1991).....11

In the Estate of Brown, 955 S.W.2d 940, 941(Mo.App. S. D., 1997).....16

Cases

in *Ewing v. Bryan*, 883 S.W.2d 545 (Mo. App. W.D. 1994)..... 16

In Re the Estate of Johnson, 912 S.W.2d 560 (Mo. App. E.D. 1995)..... 14

Kemp v. Balboa, 959 S.W.2d 116 (Mo. App. E.D. 1997)..... 15

Kemp v. Balboa, 959 S.W.2d 116 (Mo. App. E.D. 1997) 15

Missouri Supreme Court Rule 41.01 (b)...... 13

Missouri Supreme Court Rule 41.02..... 12

Property Exchange & Sales, Inc. v. King, 822 SW2d 572, 573 (Mo. App. E.D. 1992) 9

Property Exchange & Sales, Inc. v. King, 822 SW2d 572, 573 (Mo. App. E.D. 1992). 9

Supreme Court Rule 41.01 (a) 13

Supreme Court Rule 41.01 (a) 13

Supreme Court Rule 67.03 13

the Estate of Brown, 955 S.W.2d 940, 941(Mo.App. S. D., 1997)..... 16

Section 473.360 RSMo.....19

Section 473.380 RSMo.....20

Section 473.401 RSMo.....21

Section 473.407 RSMo.....	21
Section 510.150 RSMo	17

JURISDICTIONAL STATEMENT

Respondent agrees with the Jurisdictional Statement of Appellant, that this Honorable Court has jurisdiction of this appeal and that it is properly before this court on it's order of transfer.

STATEMENT OF THE FACTS

Respondent agrees with Appellant's recitation of the pertinent and germane facts in this matter. No further assertion of facts of the underlying cause are necessary.

POINTS RELIED ON

THE CIRCUIT COURT, PROBATE DIVISION, DID NOT ERR IN ENTERING ITS JUDGMENT AND ORDER SUSTAINING RESPONDENT’S MOTION TO DISMISS THE CLAIM OF APPELLANT CLAYTON HOUSE, BECAUSE THE CLAIM WAS BARRED BY OPERATION OF THE COURTS EARLIER DISMISSAL OF CLAYTON HOUSE’S PRIOR CLAIM AND SECTION 510.150 RSMo., IN THAT THE PRIOR DISMISSAL WAS WITH PREJUDICE PURSUANT TO THE MISSOURI RULES OF CIVIL PROCEDURE AND CHAPTER 510.150 RSMo.

Becker Glove International, Inc., v. Jack Dubinsky & Sons, et. al.,

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Exchange National Bank v. Wolken, 819 SW2d 45 (Mo. Banc 1991).....11

In the Estate of Brown, 955 S.W.2d 940, 941(Mo.App. S. D., 1997).....16

Cases

in *Ewing v. Bryan*, 883 S.W.2d 545 (Mo. App. W.D. 1994)_____ 16

In Re the *Estate of Johnson*, 912 S.W.2d 560 (Mo. App. E.D. 1995) _____ 14

Kemp v. Balboa, 959 S.W.2d 116 (Mo. App. E.D. 1997) _____ 15

Kemp v. Balboa, 959 S.W.2d 116 (Mo. App. E.D. 1997) _____ 15

Missouri Supreme Court Rule 41.01 (b)._____ 13

<u>Missouri Supreme Court Rule 41.02</u>	12
<u>Property Exchange & Sales, Inc. v. King</u> , 822 SW2d 572, 573 (Mo. App. E.D. 1992)	9
<u>Property Exchange & Sales, Inc. v. King</u> , 822 SW2d 572, 573 (Mo. App. E.D. 1992).	9
<u>Supreme Court Rule 41.01 (a</u>	13
Supreme Court Rule 41.01 (a)	13
Supreme Court Rule 67.03	13
the Estate of Brown, 955 S.W.2d 940, 941(Mo.App. S. D., 1997)	16
 Section 473.360 RSMo.....	19
Section 473.380 RSMo.....	20
Section 473.401 RSMo.....	21
Section 473.407 RSMo.....	21
Section 510.150 RSMo	17

ARGUMENT

THE CIRCUIT COURT, PROBATE DIVISION, DID NOT ERR IN ENTERING ITS JUDGMENT AND ORDER SUSTAINING RESPONDENT'S MOTION TO DISMISS THE CLAIM OF APPELLANT CLAYTON HOUSE, BECAUSE THE CLAIM WAS BARRED BY OPERATION OF THE COURTS EARLIER DISMISSAL OF CLAYTON HOUSE'S PRIOR CLAIM AND SECTION 510.150 R.S.Mo., IN THAT THE PRIOR DISMISSAL WAS WITH PREJUDICE PURSUANT TO THE MISSOURI RULES OF CIVIL PROCEDURE AND CHAPTER 510.150 RSMo.

1. Standard of Review

This Court must affirm the dismissal of this claim if that dismissal can be sustained on any ground supported by the motion to dismiss, regardless of whether the trial court relied on that ground or not. Kennedy v Microsurgery, 18 SW3d 39, 43 (Mo. App. 2000). Respondent agrees with Appellant that appellate review of a grant of a motion to dismiss is de novo. Kanefield v. SP Distributing Co., L. L. C., 25 SW3d 492, 495 (Mo. App. 2000).

2. Under Missouri Rules of Civil Procedure and Section 510.150 RSMo (1994), the dismissal of Clayton House's prior claim was with prejudice

The Appellant seems to suggest that all Missouri Rules of Civil Procedure supersede all conflicting Missouri statutes. While that statement on its face is generally accurate, it does not accurately reflect the underlying nuances and connectivity of Supreme Court Rules, various statutes and the different relationships and applications of those rules and statutes to different kinds of proceedings, (i.e., probate and civil). Appellant's premise is faulty and inaccurate. Missouri Rules of Civil Procedure do supercede all conflicting statutes, but there can exist other applicable laws and procedures. In the case at bar there are other laws and procedures that are applicable, to wit, Supreme Court Rules 41.01(a) and (b) and Section 510.150 RSMo.

This Honorable Court has very recently provided some guidance in this regard, in Becker Glove International, Inc., v. Jack Dubinsky & Sons, et. al., case number SC83294, handed down by this Honorable Court on April 24, 2001. This Court noted there that Chapter 517, which applies to practice and procedure of civil cases filed in associate circuit divisions dictates that the Rules of Civil Procedure "shall apply to cases or classes of cases to which this chapter is applicable, except where otherwise provided by law". This court goes on to recite

likewise that Rule 41.01(d) provides that, “civil actions pending in the associate circuit division shall be governed by Rules 41 through 101, except where otherwise provided by law”. The issue in that case dealt with the question of whether or not compulsory counterclaims, required in Rule 55.32 (a), were required to be filed in associate circuit court cases. This Court stated in Becker Glove International, “except where otherwise provided by law” includes Section 517.031, which is one of the statutes in which there are procedural requirements different from those in the Rules of Civil Procedure., (citing to Exchange National Bank v. Wolken, 819 SW2d 45 (Mo. Banc 1991). Section 517.031 provided a procedure contrary to certain Supreme Court Rules. The statute, Section 517.031 RSMo. dispensed with some of the formality in associate civil cases by relieving parties of the requirement of filing certain responsive pleadings which are normally required by Rule 55.32 (a), yet the statute was deemed to apply while the general Rules of Civil Procedure did not. There existed an acceptable procedure, “otherwise provided by law”, said this Court. This Court declared that the Section 517.031 RSMo., controlled there. Becker, Id.

A superficial examination of the facts of that case revealed only what appeared to be a conflict between the statute and the rules. No real conflict really existed, as there were procedures (relaxing pleading requirements) which were,

“otherwise provided by law”, within the statute. The analysis of what appears to be a conflict between statute and rules is very similar to the case at bar.

Appellant states in the case at bar that an “involuntary dismissal shall be without prejudice unless the court specifies otherwise in its order” relying on Rule 67.03. The appellant then refers us to and relies upon Supreme Court Rule 41.02 which states that Rules of Civil Procedure supersede all statutes and existing court rules inconsistent therewith, Rule 41.02, contending therefore that Section 510.150 R.S.Mo. (which provides the exact opposite) is superseded (Appellant Brief, pg. 10).

Rule 41.02 purports to and does deal with conflicts between statutes and rules. Where that occurs, of course, the rules prevail. Respondent agrees that that accurately reflects the intent and extent of Rule 41.02. In the case at bar a simplistic application of that principle to the facts presented would suggest where the Rule 67.03 and the statute 510.150 appear to contradict each other, that the Rule supercedes the statute, as it would be, “inconsistent therewith”. Missouri Supreme Court Rule 41.02. That of course assumes and presupposes that there is a real, not an apparent, conflict between the two, but it is Respondent’s contention that there is no contradiction or conflict, in this case, between the two (Section 510.150 RSMo and Rule 67.03).

Rule 41.01 (a) adds meaning to the application of the principles involved here: It states that, “Rules 41 through 101 shall govern, “civil actions pending before a circuit judge *except those actions governed by the probate code.*” Supreme Court Rule 41.01 (a) (italics added).

That same rule goes on to declare that other rules, to-wit: 41, 54, 18, 55.03, 56, 56, 58, 59, 60, 61 and 62 do apply to proceedings in the probate division of the circuit court. It also provides that the judge of the probate division may order that any or all of the other Rules 41 through 101 shall be applicable in a particular matter. Rule 41.01 (b).

Rule 41.01 (b) therefore defines more particularly which rules do and which rules do not apply to the circuit court and/or more specifically to the probate division of the circuit court. Appellant relies heavily on Rule 67.01 and 67.03. Rule 67.01 however deals only with voluntary dismissals and when actions may be refiled. As the dismissal in the case at bar does not involve a voluntary dismissal that Rule does not apply.

Rule 67.03 does state, as appellant contends, that “any involuntary dismissal shall be without prejudice unless the court in its order for dismissal shall otherwise specify”. Supreme Court Rule 67.03. The dismissal in the case at bar was obviously an involuntary dismissal, for appellant’s failure to prosecute its claim in

the probate division. The dismissal memorandum from the court did not specify whether same was with or without prejudice.

Appellant of course seeks the application of Rule 67.03 to this dismissal. Rule 67.03 however is not applicable in this case, by virtue of its very exclusion in Rule 41.01 (a) and (b). Rule 67.03 is not one of those other rules set forth in Rule 41.01 (b) that specifically are enumerated for application in the probate division. The probate court may, not must, apply any of the other rules of civil procedure to probate matters. It is a matter of discretion. It is not obligatory. There is no such order in this case specifically declaring that all or any of the other rules of civil procedure were to apply to this proceeding. No others being so designated, no others apply.

Appellant relies on the case, In Re Estate of Johnson, 912 S.W.2d 560 (Mo. App. E.D. 1995) where the probate court ordered the dismissal of the plaintiff's, "Objection to Final Settlement" There was no declaration by the trial court as to whether the dismissal was with or without prejudice and the dismissal was deemed on appeal to be without prejudice, purportedly pursuant to Rule 67.03. While that is the apparent result in Johnson, the principle of law there is not otherwise reconciled with existing and apparently contradictory law and is only stated in a footnote, without any explanation or citation for purposes of precedential evaluation. The trial court's order relating to one of the two counts in that case

was clearly delineated as being dismissed “without prejudice”, so clearly there is no issue relative to it. The order relating to the other of appellant’s counts which was dismissed, “Objection to Final Settlement” failed to make any such declaration. Unfortunately there is no further recitation of the facts of the particular case and we are left without sufficient information to understand the underlying legal or factual basis for the court’s ruling. Johnson appears to be an irregular or errant decision.

Later cases hold differently than Johnson. In Kemp v. Balboa, 959 S.W.2d 116 (Mo. App. E.D. 1997), the Court of Appeals dealt with similar issues and the application of civil procedure rules to probate proceedings. In Kemp, an order denying a motion for revocation of letters of administration was determined to be appealable, according to the court, even though it was not delineated as a “judgment”. At issue in that case was whether or not Rule 74.01 applied to proceedings in probate divisions of the circuit court. Rule 74.01 of course requires that an order must be denominated “judgment” and signed by a judge to be final and appealable. The order appealed from in Kemp was not so labeled. The Court of Appeals held that “Rule 41.01(b) provides that certain rules, not specifically including 74.01, apply to proceedings in the probate division of the circuit court.” Kemp pg. 118. In that case the Court went on to hold that Rule 74.01(a) was not applicable to that probate proceeding and that the matter was properly before the

court despite the fact that the written order was not delineated as a “judgment”. Rule 41.01 (b) sets forth which rules apply to probate and which rules do not. Rule 74.01 (a) not being specially declared to apply, therefore does not. Similar results are found In the Estate of Brown, 955 S.W.2d 940, 941(Mo.App. S. D., 1997)

Likewise, in Ewing v. Bryan, 883 S.W.2d 545 (Mo. App. W.D. 1994), the court affirmed the principles set forth above, that without specific directives to the contrary, general rules of civil procedures do not apply in probate proceedings without specific designation by the probate court. That court said that Rules 74.06 and 75.01, the rules at issue there, provide the basis for the general rule that a judgment is final thirty days after it is entered and may not be vacated, reopened, corrected, amended or modified by the trial court thereafter Ewing, at pg. 547. The court in Ewing held however that Rule 75.06 (b) does not apply to probate proceedings, citing to Rule 41.01, as those rules (Rules 74.06 and 75.01) had not been set forth as being specifically applicable to the probate proceedings at hand there. Id. There being no order by that probate court to the contrary, that the general, or that any other specific, rules of civil procedure should apply to that probate proceeding, the only rules applicable were those set forth in rule 41.01 Id. Rules 74.06 and 75.01 not being so listed are excluded and are not applicable.

The principles in those three cases are very similar in nature to the case at bar now and are applicable here. There was no specific order by the probate court

designating that all of the general rules of civil procedure or any specific rules of civil procedure were to apply to the proceeding at hand. Likewise in the case at bar, Rule 67.03 does not apply for the same reasons. The controlling rules in the case at bar are Rules 41.01 (a) and (b). Rule 41.01 (a) dictates that Rules 41 through 101 shall govern essentially all civil actions, except those actions governed by the probate code and Rule 41.01 (b) specifically articulates with crystal clarity a certain set of rules that do apply to probate proceedings. Rule 41.01 (a) and (b). Rule 67.03 is not therein enumerated. It is therefore excluded. Finally, the court made no order that any or all of the other rules 41 through 101 were to be applicable to this probate proceeding, and therefore and accordingly none are applicable.

This dismissal should stand. Rule 41.01 clearly eliminates application of Rules 67.01 and 67.03. The only controlling law, arguably applicable and remaining, is that of Section 510.150, R.S.Mo., wherein it definitively dictates that any involuntary dismissal other than one for lack of jurisdiction or for improper venue shall be with prejudice unless the court in its order for dismissal shall otherwise specify. Section 510.150, R.S.Mo The court did not otherwise specify. Rule 67.01 and 67.03 do not apply by application of Rule 41.01 (b). The order of dismissal should have been and was properly determined by the trial court to have been with prejudice.

In the case at bar we do not really have to deal with the question of which controls in an apparent conflict of law, the Rules of the Statutes, as there is no conflict. Any conflict is only apparent and not real. It is not real because Rule 67.03 does not apply, by its very exclusion in Rule 41.01 and because it was never designated by special order of court to be applicable.

Appellant's analysis and argument commence in the wrong place, and with the wrong assumption, that there is a conflict that requires resolution. Logically, the first question should be whether or not and which of the Rules of Civil Procedure apply to probate proceedings. Those questions are answered by reference to the Rule first listed, being 41.01(a) that states that all of the Rules of Civil Procedure (from 41 to 101) apply to all civil actions "pending before a circuit judge *except those actions governed by the Probate Code.*" Rule 41.01 (a) (emphasis added). This is a distinction with a purpose. There is within the Supreme Court Rules an acknowledgement that the Probate Code exists and is to be treated differently from other civil proceedings. Rule 41.01(b) sets forth very precisely which rules of the entire universe of rules available (from 41 to 101) apply to probate proceedings, those relating to discovery and those relating to mental and physical examinations, and only other rules specifically ordered to apply by the probate judge. Rule 41.01 (b)

Contrary to Appellant's argument, it is not essential that Rule 41.02 or 41.04 are ever reached for guidance, as it simply is not necessary to reach them.

Appellant essentially starts its argument there, assuming the application of Rule 41.02 and 41.04. The answer is already provided as to what procedure and rules apply, those specifically identified in Rule 41.01 (a) and (b).

Neither Rules 41.02 nor 41.04 are designed to answer the question of whether the civil rules apply and they do not answer the question. Rule 41.04 merely dictates what procedure is to be followed if there is no other procedure provided by rule. In this case Rule 41.01 (a) and (b) provide the other procedure. Their application precludes the application of Rule 67.03, leaving only Section 510.150 RSMo. Any other interpretation of Rule 41.04 destroys the design and purpose of the Civil Rules as they relate to probate proceedings. In effect, there would be no distinction between what rules apply to probate proceedings and other civil actions.

For example, what was before this Honorable Court, in this case, was a "claim". The "claim" is uniquely a product of the Probate Code, duly promulgated by the legislature, same being defined and rules being enunciated relating thereto in Sections 473.360 RSMo., et. seq. A "claim" is the counterpart to the "petition" for damages in a civil action, although it is handled by different rules and different procedures than a petition. For instance, Supreme Court Rule 53.01 requires that a

civil action is commenced by filing a “petition” with the court. A “claim”, on the other hand, while similar to a petition (in that it seeks remuneration for services rendered or for damages), does not require a “petition” to be filed with the probate court to proceed to judgment. Supreme Court Rule 55.01 however mandates that there shall be a “petition” in a civil action. Supreme Court rule 55.01. If this Honorable Court’s assessment and application of this Rule 41.04 is to be to all probate proceedings, then claims, which now require only a “writing stating the nature and amount thereof”, Section 473.380 RSMo., will need to be in the form of and presumably labeled as “petitions” so as to be consistent with rule 53.01, which requires that a “civil action is commenced by filing a petition with the court”. Rule 53.01.

The civil rules also require that a defendant shall file an answer, in a civil action, within thirty days after the service of the summons. Supreme Court Rule 55.25. No answer is (or at least was prior to the Court of Appeals’ ruling herein) required in response to a claim, and there is (was) no requirement for the service of a summons in the processing of a claim in probate court. Section 473.380. RSMo. Indeed, this statute requires that , “upon the filing of any claim, the probate clerk shall immediately send a copy of the claim to the personal representative or his attorney” Section 473.380(4) RSMo. One might now assume that the clerk shall

instead “forthwith issue the required summons or other process”, as is required by Rule 54.01.

In defending against a claim, the Respondent “may” assert the same offsets and other defenses (emphasis added) against any suit or other proceeding, Section 473.407 RSMo., and the personal representative shall file a statement of all offsets or counterclaims against the creditor not less than twenty days prior to the date of the hearing Section 473.401 RSMo. This is of course different from and therefore inconsistent with the rules relating to counterclaims in civil actions, where Supreme Court Rules establish when and how compulsory counterclaims shall be asserted, specifically that “a pleading *shall state as a counterclaim* (emphasis added) any claim that at the time of serving the pleading the pleader has against any opposing party”. Supreme Court Rule 55.32

As has been demonstrated, if the Court of Appeals is correct in it’s assessment and application of this Rule 41.04 to probate proceedings, then presumably it would apply to the filing of claims and would invalidate many of the probate statutes promulgated in support of that process. As a result, instead of the current procedure being followed in probate courts in this state, petitions, answers and summons, not now required anywhere in the statutory language of the Probate Code will likely be required in order to maintain consistency with the Rules of

Civil Procedure and will supercede and effectively overrule the statutorily created claims provisions of the Probate Code.

The effect of this Court of Appeals decision will have ramifications that go beyond the subject matter of claims. All probate proceedings would be subject to the Civil Rules, such as petitions to appoint guardian, conservators and personal representatives, petitions for homestead allowance, family allowance and exempt property, to name a few. The procedural landscape in probate proceedings would drastically change.

The Probate Code was presumably created separate and distinguished from other types of civil actions, for a reason, and Respondent assumes that the legislature and the Missouri Supreme Court did not enact those laws and rules clearly designating some as “probate”, without a purpose. The Court of Appeals opinion, in effect, obliterates the distinction between Supreme Court Rules of Civil Procedure and statutes that have governed probate proceedings. It’s ruling erodes critical distinctions between probate procedures and other civil actions. If that is by design and intentional then so be it. While the Court of Appeals was certainly free to so interpret, it is the respectful opinion of the Respondent herein that that may not have been the intent of that court. Respondent verily believes that the court may not have considered the far reaching impact that this decision may have in the practice of law in probate proceedings. This Honorable Court contemplated

the special and unique status of probate claims and other probate proceedings when it specifically deemed that only certain Rules shall apply to probate proceedings, including Rules 41, 54.18, 55.03, 56, 57, 58, 59, 60, 61 and 62., Supreme Court Rule 41.01(a)(2) and certain rules such as 67.03 do not apply. Presumptively there is a purpose of so designating certain rules to apply in probate matters.

The issues in the case at bar are of significant general interest or importance and with far reaching effect and consequence. Rule 67.03 does not and should not apply to the Appellant's claim. Section 510.150 RSMo. does and should apply. There is no conflict between this statute and that rule. Rule 41.01 (a) and (b) logically dictate this result. The claim should be dismissed with prejudice.

CONCLUSION

Rules 41.01 (a) and (b) specifically set forth court rules applicable to probate proceedings. They are clearly enumerated therein. Neither Rule 67.01 nor Rule 67.03 are not so enumerated. They do not therefore apply to this probate proceeding. Rules 41.01 (a) and (b) permit the probate court to designate certain or all other rules of civil procedure to apply to probate proceedings where and if appropriate. There was no such designation in this case, and certainly none made relative to Rule 67.01 nor Rule 67.03. Neither Rule therefore applies by special designation of the probate court. The only controlling law accordingly is Section 510.150, R.S.Mo., which declares that an involuntary dismissal without any provision to the contrary in the order shall be with prejudice. The dismissal in this case was and should have been with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE:

The undersigned hereby certifies that two copies of the Respondent's Substitute Brief, Statement and Argument was deposited in the U.S. Mail, clearly addressed and with proper postage affixed thereto to the law offices of Appellant's counsel, Thomas B. Weaver, Cynthia A. Sciuto and Marshall R. Hoekel, Armstrong, Teasdale LLP, One Metropolitan Square, Suite 2600, St. Louis, Missouri 63102-2740, this _____ day of _____, 2001.

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CERTIFICATE OF COMPLIANCE WITH SPECIAL RULE NO. 1

The undersigned certifies that the foregoing Substitute Brief of Respondent includes the information required by Rule 55.03, and complies with the requirements contained in Special Rule No. 1(b). Relying on the word count of the Microsoft Word program, the undersigned certifies that the number of words contained in the Respondent's Substitute Brief, excluding the cover page, certificate of service, signature block, appendix and certificate required by Special Rule No. 1(c) is 3,927.

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